

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statutes and regulations involved.....	2
Statement.....	2
Argument.....	8
Conclusion.....	15
Appendix.....	17

CITATIONS

Cases:

<i>Ajello</i> , In re, 259 App. Div. 949.....	15
<i>Brown</i> , In re, 260 App. Div. 972.....	15
<i>Casement v. Brown</i> , 148 U. S. 615.....	12
<i>Dellapenta</i> , In re, 261 App. Div. 863.....	15
<i>Earle</i> , In re, 262 App. Div. 789, affirmed, 286 N. Y. 610.....	15
<i>Fuller Brush Co. v. Industrial Commission</i> , 99 Utah 97.....	9
<i>Hill Hotel Co. v. Kinney</i> , 138 Nebr. 760.....	15
<i>Hull v. Philadelphia & Reading Ry. Co.</i> , 252 U. S. 475.....	9
<i>Indian Refining Co. v. Dallman</i> , 119 F. (2d) 417.....	9
<i>Jones v. Goodson</i> , 121 F. (2d) 176.....	9, 12
<i>Meyer, A. J., & Co. v. Unemployment Compensation Commission</i> , 152 S. W. (2d) 184.....	9
<i>Miller, Claim of</i> , 262 App. Div. 385.....	15
<i>People v. Grier</i> (App. Dep't., Cal. Super. Ct., Los Angeles County, decided July 24, 1942).....	14, 15
<i>Phelps Dodge Corp. v. National Labor Relations Board</i> , 313 U. S. 177.....	11
<i>Rogavin</i> , In re, 259 App. Div. 774.....	15
<i>Rossini v. Tone</i> , 7 Conn. Supp. 13.....	15
<i>Singer Manufacturing Co. v. Rahn</i> , 132 U. S. 518.....	12
<i>Standard Acc. Ins. Co. v. Pennsylvania Car Co.</i> , 49 F. (2d) 73.....	9
<i>Steel Pier Amusement Co. v. Unemployment Compensation Commission</i> , 127 N. J. L. 154.....	15
<i>Ten Eyck Co.</i> , In re, 41 F. Supp. 375.....	15
<i>Texas Co. v. Higgins</i> , 118 F. (2d) 636.....	9
<i>U. C. C. of Wyoming v. Mathews</i> , 56 Wyo. 479.....	15
<i>United States v. American Trucking Ass'ns.</i> , 310 U. S. 534.....	9, 11

II

Statutes:	Page
National Labor Relations Act, c. 372, 49 Stat. 449:	
Sec. 2 (U. S. C., title 29, sec. 152)-----	11
Social Security Act, c. 531, 49 Stat. 620:	
Sec. 804 (U. S. C., title 42, sec. 1004)-----	17
Sec. 811 (U. S. C., title 42, sec. 1011)-----	10, 17
Miscellaneous:	
American Law Institute, Restatement, Law of Agency, sec. 220-----	12
Mim. 4651, 1937-2 Cum. Bull. 389-----	15
S. S. T. 375, 1939-2 Cum. Bull. 280-----	15
Treasury Regulations 91, promulgated under the Social Security Act:	
Art. 2-----	18
Art. 3-----	10, 18

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 253

GRIFF WILLIAMS, PETITIONER

v.

THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact (R. 318-333) and conclusions of law (R. 363) of the District Court are reported in 38 F. Supp. 536. The District Court delivered no opinion. The opinion of the Circuit Court of Appeals (R. 386-394) is reported in 126 F. (2d) 129.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 27, 1942 (R. 394). By

(1)

order of a Justice of this Court entered May 18, 1942, the time for filing a petition for certiorari was extended to and including July 25, 1942 (R. 400). The petition for a writ of certiorari was filed July 24, 1942. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTION PRESENTED

Whether the petitioner, the leader of an orchestra known as "Griff Williams and His Orchestra", was, during the year 1938, an independent contractor and the employer of the members of his orchestra within the meaning of sections 804 and 811 of Title VIII of the Social Security Act of 1935, as amended.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 17-20.

STATEMENT

The findings of fact of the District Court which are undisputed may be summarized as follows:

During the year 1938 petitioner was the leader of a dance orchestra known as "Griff Williams and His Orchestra", which consisted of from twelve to fourteen men. It was assembled by the petitioner in San Francisco, California, during the year 1934, and since 1935 has been booked and known by this name. During 1938 the orchestra performed at

some twenty-two establishments, ranging from the west coast of the United States to Chicago, Illinois. Petitioner and his orchestra played both "steady engagements" (those for one week or longer) and "single engagements" (those for one night only) at hotels, restaurants, night clubs, ballrooms, amusement parks, clubs, colleges and civic organizations. (R. 320.) This suit was brought by petitioner to recover the amount of \$536.04 paid by him for the year 1938 as taxes, interest, and penalties under section 804 of Title VIII of the Social Security Act of 1935, as amended (R. 318-319).

The members of the orchestra, known in the trade as "sidemen", were selected and discharged from the orchestra by petitioner (R. 330). Petitioner and all of the sidemen were members of the American Federation of Musicians, a labor union affiliated with the American Federation of Labor (R. 319, 330). It was orally agreed by the petitioner and each individual sideman that for the latter's services the sideman would receive a certain stipulated compensation which in no event should be less than the scale of wages fixed by the local union in whose jurisdiction the engagement was played. The establishment in which the orchestra played had no voice in fixing the compensation of sidemen. (R. 330.)

During the tax year, all of the engagements filled by petitioner and his orchestra were secured by the Music Corporation of America, serving as peti-

tioner's booking agent (R. 328). The Music Corporation of America suggested to the managements of the prospective establishments a number of orchestras and advised them as to the standings and qualifications of each. The representatives of the establishments made inquiries as to the quality of petitioner's orchestra, listened to the orchestra's music either personally or on the radio, and, if the style was found suitable for the establishment's purposes, petitioner's orchestra was engaged. In securing petitioner's orchestra, the establishments were not concerned with or did not know the names or identities of the individual musicians. They were familiar with the reputation and special quality of the music of petitioner's orchestra, and they relied on petitioner to bring to the establishment an organization composed of musicians selected and rehearsed by him, capable of performing its special quality of music. (R. 329.)

Each of the engagements which petitioner's orchestra played during 1938 was the subject of a written contract negotiated in the manner described above (R. 321, 328). In these contracts the Music Corporation of America agreed to furnish the attraction designated as "Griff Williams and His Orchestra" at a designated time and place for a specified sum of money per night (R. 321) or per week (R. 324). In some of the contracts the number of sidemen was stated (R. 324), and in others it was not (R. 326). The sidemen did not sign

and were not named in the contracts (R. 321-328). Each of the contracts provided that the laws, rules, and regulations of the American Federation of Musicians were a part of it (R. 322, 324, 327). The rules and regulations of the Federation imposed certain limitations upon the contracting parties with respect to prices for performances, the number and length of rehearsals and intermissions, cancellation of contracts, and conduct of the leader and sidemen (R. 329; Pl. Ex. 24, pp. 58, 65, 78, 79, 83, 88, 89, 100, 114, 122, 131, 140, 157). Certain of the by-laws of the Federation refer to the establishment as the "employer" (Pl. Ex. 24, p. 80), while certain other by-laws refer to the leader as "employing" the sidemen (Pl. Ex. 24, pp. 84, 86).

The contract price for the engagements was sometimes more, but never less, than the minimum wages for leaders and sidemen fixed by the local union in whose jurisdiction the establishment was located (R. 330). Petitioner either in person or through his agent, the Music Corporation of America, collected the contract price from the establishment (R. 329-330). Each establishment bore the expense of advertising the petitioner's engagement and at its own expense procured from the copyright owner license to permit the playing of copyrighted music by petitioner's orchestra (R. 331). Petitioner and the sidemen furnished their own instruments other than the piano, which was furnished by the establishment (R. 331). On cer-

tain occasions the establishments furnished music racks, microphones, sound amplifiers and special lighting facilities (R. 332). However, petitioner owned music racks and a public address system for use where this equipment was not supplied by the establishment (R. 331). The establishments owned and controlled the premises on which the services were performed and designated the particular room on the premises where the orchestra was to perform and rehearse (R. 332).

On occasion petitioner's orchestra played special music for floor shows promoted by the establishment (R. 331). On these occasions the selections to be played were furnished either by the establishment or by the participants in the floor show. This called for the conducting of special rehearsals with the other talent at times and places fixed by the establishment within the limit of union rules. (R. 333.) The time of the regular rehearsals of the orchestra (other than those with respect to floor shows) was fixed by petitioner (R. 320). At some establishments there were in effect rules governing the conduct of the leader and members of the orchestra, relating to mingling with the guests, the parts of the establishment to which the musicians were to retire during intermission, and, within the limit of union rules, the time and length of the intermissions and rest periods. (R. 332-333.)

In addition to the foregoing, the District Court entered certain findings which were challenged by

the Government on appeal (R. 365-371). Finding 11 of the District Court stated that upon receiving compensation from the establishments petitioner "distributed and paid" to the members of the orchestra the compensation due them respectively (R. 330). The Circuit Court of Appeals held that this finding, if construed to mean that petitioner was acting as the agent of the establishment in making such payments, was unsupported by the evidence (R. 388). Finding 19 of the District Court recited that "at times" during the year 1938 the establishments for which petitioner and his orchestra performed "determined", "required", "directed", "dictated", and furnished "instructions" to petitioner and the orchestra regarding various matters connected with their performance. Such findings were included in twenty-one subparagraphs, designated (a) to (u) inclusive. (R. 331-333.) Of these, subparagraph (s) contained a finding that the establishments at times dictated the selections to be played and the style, length, tempo and volume of the music. With respect to these subparagraphs, the Circuit Court of Appeals observed that a finding as to what was done "at times" was of little probative value and that the instances so listed were relatively unimportant when balanced with the other facts found by the District Court. (R. 389.) The Circuit Court of Appeals held, moreover, that any such "control"

which was exercised by the establishments was without right, since the status of the parties was fixed by the contracts, which precluded such control on the part of the establishment. The court concluded that what appears to have been control could be more aptly described as requests that certain things be done by petitioner and his orchestra. (R. 391.)

The Circuit Court of Appeals affirmed the trial court's finding that the sidemen were discharged by petitioner (R. 330) and rejected petitioner's contention that any such right of discharge was reserved to the establishments in which the orchestra played (R. 389). The court below also affirmed a finding (R. 330) that petitioner paid the traveling expenses of the orchestra, commissions, and other miscellaneous expenses, as well as the compensation of the sidemen, and that the residue of the contract price, if any, belonged to petitioner (R. 392). The court concluded that petitioner was engaged in an independent business for profit (R. 392). It reversed the judgment of the District Court, holding that petitioner was an independent contractor and the employer of the sidemen (R. 390, 394).

ARGUMENT

It is conceded that the sidemen in petitioner's orchestra were during the tax year employees of someone; the controversy turns on whether petitioner was an employee of the establishments where

the orchestra played, in which case so also were the sidemen, or whether petitioner was an independent contractor, in which case the sidemen were his employees. In determining that the petitioner was an independent contractor, the Circuit Court of Appeals applied criteria familiar to the common law of agency (R. 390-391). Prior to the decision in the instant case, the court below and the two other circuit courts of appeals which have passed upon the question had held it necessary to an employment within the meaning of the statute that the general legal relationship of employer and employee exist between the person for whom services are performed and the individual who performs them, and had held that an independent contractor is not an employee. *Texas Co. v. Higgins*, 118 F. (2d) 636 (C. C. A. 2); *Jones v. Goodson*, 121 F. (2d) 176 (C. C. A. 10); *Indian Refining Co. v. Dallman*, 119 F. (2d) 417 (C. C. A. 7).¹

¹ The same conclusion has been reached under state unemployment compensation statutes. *A. J. Meyer & Co. v. Unemployment Compensation Commission*, 152 S. W. (2d) 184 (Mo.); *Fuller Brush Co. v. Industrial Commission*, 99 Utah 97. Similarly, it has been held under the Federal Employers' Liability Act and state workmen's compensation laws that the words "employer" and "employee" were used in these statutes in their accepted common law meanings. *Hull v. Philadelphia & Reading Ry. Co.*, 252 U. S. 475; *Standard Acc. Ins. Co. v. Pennsylvania Car Co.*, 49 F. (2d) 73 (C. C. A. 5). These decisions do not conflict with *United States v. American Trucking Ass'ns*, 310 U. S. 534, referred to by petitioner (Br. 45-46), where all of the persons involved were concededly employees and the only question was whether the

The statute and the regulations issued under it confirm this judicial analysis. Section 811 (b) of Title VIII of the Social Security Act (Appendix, *infra*, p. 17) provides:

The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, * * *.

Article 3 of Treasury Regulations 91 (Appendix, *infra*, pp. 18-20) provides, in part:

Every individual is an employee within the meaning of Title VIII of the Act if he performs services in an employment as defined in Section 811 (b) (see article 2).

However, the relationship between the person for whom such services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. * * * In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not

expression "employee" as used in the Motor Carrier Act comprehended, in view of the legislative policy evinced in other legislation, all employees or only those whose duties affected the safety of operations.

as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

While Congress is free, within constitutional limits, to define the terms "employer" and "employee" in whatever sense it chooses and in many statutes has expressly broadened them beyond their common-law significance,² no such intent is expressed in the Social Security Act. For this reason petitioner's reference (Br. 28-29) to the status of the sidemen under the National Labor Relations Act is inapposite. Unlike the Social Security Act, the National Labor Relations Act contains its own general definition of the term "employee". Section 2 (3) of that act, c. 372, 49 Stat. 449 (U. S. C., title 29, sec. 152 (3)), provides that the—

* * * term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise * * *.

See *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 190-193.

The court below held in this case that the Social Security Act refers to the legal relationship of employer and employee as they are understood in general law and that an independent contractor is

² Several of these statutes are referred to in *United States v. American Trucking Ass'ns*, *supra*, pp. 545-546, note 29.

not an employee for the purposes of the Act; this holding is not in conflict with the decisions of other circuit courts of appeals or of this Court, and is correct.

In determining whether petitioner was an employee or an independent contractor the court below applied the test of control, laid down in the Regulations and in accord with the principle of agency announced by virtually unanimous authorities. The employer-employee relationship exists only where the person for whom the work is done has the right to control and direct the work not only as to the result to be accomplished but as to the details and means by which that result is accomplished. *Casement v. Brown*, 148 U. S. 615; *Singer Manufacturing Co. v. Rahn*, 132 U. S. 518; *Jones v. Goodson*, *supra*; American Law Institute, Restatement, Law of Agency, sec. 220.

In applying this test, the Circuit Court of Appeals properly concluded that petitioner was an independent contractor rather than an employee. The court gave weight to the fact that petitioner engaged the sidemen (R. 389, 392), that control over the manner in which music was rendered rested with petitioner rather than the establishments (R. 391), that the right of discharge of the sidemen lay solely in petitioner (R. 392),³ and that peti-

³ Petitioner's claim (Br. 18, 22-23, 25, 37) that the right to discharge the sidemen did not lie solely with petitioner but also rested with the establishment is not supported by the findings of the District Court and was expressly rejected by

tioner's orchestra was a going establishment managed by petitioner as an independent business for profit (R. 392). That the services of petitioner's orchestra were invariably performed upon the premises of an engaging establishment was necessitated by the nature of the business. While this circumstance might lend some color to petitioner's claim, it is unpersuasive when the primary factor of control of services is considered.

Nor can petitioner succeed in his contentions that he is a mere "go-between for the establishment and the sidemen" (Br. 33), that the travelling and other expenses of the orchestra were assumed and paid by the establishment rather than by petitioner (Br. 39, 40-41), or that he undertakes no risks and stands to gain no profit (Br. 38, 39-40). As appears in the Statement (*supra*, page 8) the District Court expressly found that petitioner paid the travelling expenses, commissions, and other miscellaneous expenses of the orchestra, and that the residue of the contract compensation belonged

the Circuit Court of Appeals (R. 330, 389-390). The evidence is clear that the right both to hire and discharge the sidemen was solely the prerogative of petitioner. (R. 168, 198-199, 223-224.) Petitioner's reliance here on Article XIII, section 3-C of the by-laws of the Federation (Br. 22; Pl. Ex. 24, pp. 129-130) is wholly misplaced, since this provision relates to a termination of the engagement of an orchestra rather than to the termination of the employment of an individual sideman. Indeed, Article X, section 29 of the by-laws prohibits the sidemen from dealing directly with an establishment. (Pl. Ex. 24, p. 80.)

to him (R. 330); this finding was concurred in by the Circuit Court of Appeals (R. 392), and is fully supported by the evidence (R. 172-174).

Petitioner also challenges (Br. 34-35) the disposition by the Circuit Court of Appeals of various subparagraphs of finding 19. It suffices to point out that many of these subparagraphs refer to very minor matters (R. 331-333)⁴ and that the record fails to show that the establishments either by contract or custom had the right to control any of the matters recited in these subparagraphs (Pl. Exs. 1-19; R. 241-242). At most, petitioner sometimes complied with various requests of the establishments (Def. Ex. 2; R. 247-251). Further, the finding in subparagraph (s) that the establishments at times dictated the selections and the style, length, tempo, and volume of the music is inconsistent with other findings, to the effect that the establishments relied upon petitioner to furnish an orchestra composed of musicians selected and rehearsed by him and capable of performing the special quality of music for which his orchestra was known (R. 329), as well as with the uncontradicted testimony, including testimony of petitioner himself (R. 188, 190, 241, 242).

The decision below is in accord with the decided cases. Several other courts, including the only fed-

⁴ Cf. *People v. Grier* (App. Dep't, Cal. Super. Ct., Los Angeles County, decided July 24, 1942), not officially reported but found in C. C. H. Unemployment Insurance Service, California, par. 8391.

eral court which has previously passed on the point, have held that the orchestra leader rather than the establishment is the employer of the sidemen. In re *Ten Eyck Co., Inc.*, 41 F. Supp. 375 (N. D. N. Y.); *Hill Hotel Co. v. Kinney*, 138 Nebr. 760; *U. C. C. of Wyoming v. Mathews*, 56 Wyo. 479; In re *Brown*, 260 App. Div. 972; In re *Earle*, 262 App. Div. 789, aff'd mem., 286 N. Y. 610; *Claim of Miller*, 262 App. Div. 385; *People v. Grier* (App. Dep't., Cal. Super. Ct., Los Angeles County, July 24, 1942), not officially reported but found in C. C. H. Unemployment Insurance Service, California, par. 8391.⁵

CONCLUSION

The status of musicians under the Social Security Act, like that of many other persons, must turn on the facts of each case. For this reason there is apt to be occasional litigation in this field regardless of the decision in a particular case. We think

⁵ In the cases holding the establishment to be the employer, there were present elements indicating control by the establishment which are absent in the case at bar. In re *Ajello*, 259 App. Div. 949; In re *Rogavin*, 259 App. Div. 774; In re *Dellapenta*, 261 App. Div. 863; *Rossini v. Tone*, 7 Conn. Supp. 13 (Super. Ct., New Haven County); *Steel Pier Amusement Co. v. Unemployment Compensation Commission*, 127 N. J. L. 154. None of these decisions involved a well-established, continuing "name band" or "name orchestra," such as that conducted by petitioner (R. 213, 252). The use of this distinction as a helpful criterion is employed by the Commissioner of Internal Revenue. Mim. 4651, 1937-2 Cum. Bull. 389; S. S. T. 375, 1939-2 Cum. Bull. 280.

that the decision of the Circuit Court of Appeals is correct and presents no conflict. It is therefore respectfully submitted that the petition for certiorari should be denied.

CHARLES FAHY,

Solicitor General.

SAMUEL O. CLARK, Jr.,

Assistant Attorney General.

SEWALL KEY,

HELEN R. CARLOSS,

ALVIN J. ROCKWELL,

Special Assistants to the Attorney General.

AUGUST 1942.

